

**ORIGINAL**

IN THE SUPREME COURT OF OHIO  
2013

STATE OF OHIO,

Case No. 13-403

Plaintiff/Appellant/Cross-Appellee,

-vs-

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

AMBER LIMOLI,

Defendant/Appellee/Cross-Appellant

Court of Appeals  
Case No. 11AP-924

**MEMORANDUM OF STATE OF OHIO OPPOSING JURISDICTION OVER  
CROSS-APPEAL**

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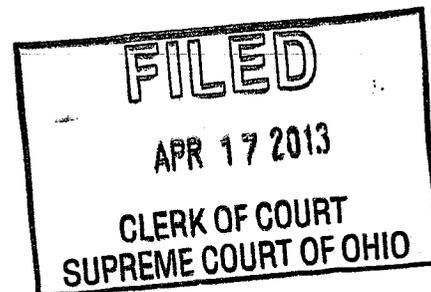
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## **EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION OVER CROSS-APPEAL**

The initial question was whether the police could initially stop defendant for jaywalking. The second question was whether there was consent to search. The Tenth District ruled against defendant on the stop, but it remanded for further fact-finding on the issue of consent and for resolution, if necessary, of the State's claim that suppression should be denied under the good-faith exception. The Tenth District also purported to apply R.C. 1.58(B) and found that, if defendant loses on suppression on remand, she would only face sentencing for a fourth-degree felony offense even though the offense was a third-degree felony with mandatory prison at the time it was committed.

Both sides are appealing here, with the State's appeal focusing on the sentencing issue under R.C. 1.58(B). Defendant is cross-appealing on the legitimacy of the stop. Neither side is appealing regarding the consent issue.

On the question of the legality of the stop for jaywalking, defendant contends that the stop was objectively unreasonable but then fails to explain what was unreasonable about it. As explained in the discussion *infra*, defendant was walking in the middle of the alley in clear violation of the requirement that pedestrians stay as far to the side of the roadway as possible when there is no sidewalk. The officers testified to this clear violation, and the trial court accepted their testimony on this point and concluded there was probable cause to stop her for the jaywalking violation. There was at least reasonable suspicion to stop defendant “[b]ased on the text of the ordinance and [the police] observation of appellant walking in the middle of the alley \* \* \*.” 10th Dist. Decision, ¶ 32.

Defendant's real complaint is that the ordinance should have an "interfere with traffic" component. She claims that there should be no violation unless there is traffic at that particular moment on the roadway. In effect, defendant is asking the courts either to rewrite the ordinance or to far exceed rational-basis review to find that "due process" requires the insertion of an "interfere with traffic" element.

Regardless of how this legal alchemy would take place, it is well settled that the invalidation of the stop on such grounds *still* would not provide a basis for suppression. An after-the-fact finding of unconstitutionality cannot provide a basis for suppression. Neither would a judicial rewriting of the ordinance to include an "interfere with traffic" element. As the Tenth District stated, "[t]his court will not rewrite the Columbus jaywalking ordinance to add as an element of the offense that the pedestrian's location in the street interfered with traffic." Decision, ¶ 29.

There was no error in the Tenth District's legal analysis of the stop. The good-faith exception would apply regardless of whether the court is finding the ordinance unconstitutional on its face or as applied. The Tenth District acknowledged this very point. Decision, ¶ 33 ("either on its face or as applied to appellant"). Either way, the officers were entitled to rely on the presumed constitutionality of the legislation unless it was clearly unconstitutional at the time. There was no clear unconstitutionality at the time of the stop, and, in fact, there is no clear unconstitutionality even now. Defendant's constitutional arguments fail.

Defendant's arguments do not provide any compelling reason to grant review. This Court should decline review of the cross-appeal.

## STATEMENT OF FACTS

The State incorporates by reference the procedural and factual history set forth in paragraphs two through seventeen of the Tenth District's original decision. The State adds the following.

Columbus Police Officer Mark Denner testified that he and Officers Harmon and Beine were on bike patrol. (T. 12) Harmon and Beine had stopped defendant for a pedestrian violation around 4:00 p.m. or 5:00 p.m. (T. 11-12, 17) Denner arrived after the stop was initiated. (T. 12)

Harmon had seen defendant "in the very dead center or in the middle of Cherry Alley walking westbound." (T. 14) The alley is wide enough that two cars could drive down it, though one would need to slightly pull over to let the other pass. (T. 15)

Denner heard Harmon ask defendant for consent to search her person. (T. 12) Defendant said, "Sure, call a female officer." (T. 12-13) Denner observed the consent, (T. 25), and defendant's demeanor was entirely consistent with her being okay with the search. (T. 30) A female officer arrived and performed the search, which led to the discovery of crack cocaine underneath the shirt. (T. 26, 27)

Columbus Police Officer Brandon Harmon testified that, before July 16, 2010, he had contact with defendant. (T. 34) He has arrested her before for crack-cocaine possession. (T. 34) Defendant "is known to the officers on eight precinct that she is a large supplier of crack cocaine on eight precinct." (T. 34) The police narcotics tactical team has found her "several times" in houses when executing search warrants. (T. 34)

On July 16, Harmon and his partner were riding their bikes "in the area where we

had heard that Ms. Limoli was selling crack cocaine.” (T. 34) “The area we work is a high-crime area. There is a lot of narcotics activity going on.” (T. 120)

On this particular day, the police were working this area “because we had heard that there was possible drug trafficking going on in an apartment complex, and Ms. Limoli’s name was being thrown out there.” (T. 120)

They saw defendant and another female walking westbound in the alley. (T. 34) “They were walking in the center of the alley side by side. They can’t go in the center of the alley, but they were walking directly down the middle westbound in the alley.” (T. 35) They were eight to ten feet from the edge of the road. (T. 35)

These actions were jaywalking “[b]ecause she was walking down the center of the alley, she wasn’t using the shoulder. There is no sidewalks. The law says you have to get as far over as you possibly can.” (T. 37-38) “[W]e saw a clear violation of her jaywalking \* \* \*.” (T. 120)

When defendant and the other woman saw the police, they changed their direction of travel, turning around and walking away from the police at a faster pace. (T. 36) Harmon thought that they were trying to avoid detection. (T. 36-37) When the police stopped the two, defendant was agitated that the police were around. (T. 38) Harmon told her that she was jaywalking. (T. 39) Because of her nervousness, Harmon asked her if she had anything on her that he should be aware of, and she said no. (T. 39)

Harmon then “asked her if she would give consent to search her person and she said: Sure. Call up a female officer. So I did.” (T. 39, 121-22) Defendant never withdrew her consent. (T. 122-23) Officer April Redick arrived within two or three

minutes and performed the search on defendant. (T. 50-51) Harmon saw the crack cocaine fall from defendant's shirt. (T. 51, 55, 125)

Officer April Redick testified that she arrived within a few minutes of Harmon's request for a female officer to perform a search. (T. 60-61) When she arrived, Harmon told her that defendant had given her consent to a search. (T. 62) Redick felt a solid object about one-half the size of a golf ball that was partly underneath the bra and partly protruding below the bra. (T. 64) The object fell out. (T. 64-65)

Defendant testified that Harmon said he was going to ticket her for jaywalking. (T. 89-90) She denied that he asked for consent, and she denied giving any consent. (T. 90) She claimed to have been handcuffed during the search, (T. 92), a fact denied by Harmon. (T. 57) The search led to the discovery of defendant's crack cocaine. (T. 93-94) She claimed that she could not walk down the sides of the alley because of needles left along the sides of the alley by drug users. (T. 94)

Officer Jeffrey Beine testified that he, Harmon, and Denner were on bike patrol. (T. 105) They saw defendant in the alley with another female. (T. 108) "[T]hey were both in the middle of the alley." (T. 108) "[T]hey were walking down the middle of the alley." (T. 109)

At the conclusion of the hearing, the court denied the motion. The court stated:

This is not a *Terry* patdown situation at all, and I'm not looking at it that way. I don't think there is any factual basis for that.

And as far as duress is concerned, the officer said she consented. She said she did not consent. Nobody suggested there was evidence to show she did consent, but it was because she was afraid or under duress, so duress is

not a issue.

As I see it, there are two issues. One of them I suppose is a legal issue. The city statute basically says if there are no sidewalks, then you need to be as close as practicable to I believe it's the left side so that you are I assume facing oncoming traffic. Multiple officers, certainly Officer Harmon and I believe one of the other officers testified that they saw Ms. Limoli in the middle of the alley. At that point they have probable cause to issue her a citation. Whether she is convicted of that later on is a different issue. So she was stopped with probable cause.

There were multiple officers that said she consented, some said directly, there were words spoken. Others through their testimony, obviously a female officer was called, brought to the scene and searched her.

Also, I think it's important that there is testimony that a crowd gathered here. I don't know that numbers were ever mentioned, but enough that police were vigilant and watching what was going on. And Ms. Limoli does not seem to be a shy young lady, she seems to speak her mind, she did just fine on the witness stand, and if she was not consenting to this search it would seem to me that there would be other people that witnessed all of this that would have been able to testify to that. I heard no one else.

So the issue on the consent comes down to a credibility question. The officers say she consented, she said she did not. And I find in favor of the officers on that issue.

So there was probable cause to write the ticket, there was probable cause to detain her. They asked for consent and she gave it. So the motion to suppress is denied.

(T. 145-46)

## ARGUMENT

**Response to Proposition of Law No. 1:** A pedestrian who is seen clearly violating an existing municipal ordinance is subject to stop by the police for the violation.

As the trial court recognized, the legality of the search breaks down into two components. First, the question is whether the police could stop defendant for the jaywalking offense. Second, the question is whether the search of defendant's person leading to the discovery of the crack cocaine was a consent search. On both points, the trial court found against defendant. The Tenth District affirmed on the issue of the stop and remanded the consent issue to the trial court.

In terms of the facts, the court's ruling on the stop was supported by competent, credible evidence, and therefore the appellate courts must accept the court's factual conclusions that defendant was walking in the middle of the alley. The question becomes whether, under a de novo standard of review, there was legal error in the trial court's ruling on the stop. Defendant does not demonstrate any such error.

A.

"The same standards will apply whether the person detained is a pedestrian or is the occupant of an automobile." *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex.Crim.App.2000). Such standards, including reasonable suspicion, apply to the stopping of pedestrians for pedestrian-traffic violations. *State v. Dillon*, 10th Dist. No. 04AP-1211, 2005-Ohio-4124, ¶¶ 25-28 (applying reasonable-suspicion standard to jaywalking stop). As a result, the following case law regarding vehicles is also pertinent to this pedestrian-traffic case.

"As a general matter, the decision to stop an automobile is reasonable where the

police have probable cause to believe that a traffic violation has occurred.” *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), citing *Delaware v. Prouse*, 440 U.S. 648, 659, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), and *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). Even without probable cause, “[t]he United States Supreme Court has stated that a traffic stop is constitutionally valid if an officer has a reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit a crime.” *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 7, citing *Prouse*, 440 U.S. at 663; *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); see also, *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, ¶ 19, n. 4.

The seriousness of the offense is irrelevant; courts will not “second guess whether a violation rose to the level of being ‘enough’ of a violation for reasonable suspicion to make the stop.” *State v. Hodge*, 147 Ohio App.3d 550, 2002-Ohio-3053, 771 N.E.2d 331, ¶ 27 (7th Dist.). “[A] violation of the law is exactly that – a violation.” *Id.* The proper question is whether any violation occurred – not the extent of the violation. *Id.* “The severity of the violation is not the determining factor as to whether probable cause existed for the stop.” *State v. McCormick*, 5th Dist. No. 2000CA00204 (2001).

Thus, “where an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the stop is constitutionally valid regardless of the officer’s underlying subjective intent or

motivation for stopping the vehicle in question.” *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12, 665 N.E.2d 1091 (1996); see also, *Mays*, at ¶ 8.

B.

Officer Harmon had at least a reasonable and articulable suspicion that defendant violated Columbus Code 2171.05. That section states in pertinent part:

(c) Where neither a sidewalk nor a shoulder is available, any pedestrian walking along and upon a street or highway shall walk as near as practicable to an outside edge of the roadway, and, if on a two (2) way roadway, should walk only on the left side of the roadway.

Harmon had at least reasonable suspicion, and indeed probable cause, that walking in the middle of the alley was not as near as practicable to the outside edge of the alley. The alley was not so narrow that walking down the middle of it was practically walking down the outside edge. As demonstrated by defense photographic Exhibits 1, 2, 4, and 6, the alley was plainly wide enough to have a discernable middle and edges, and walking down the middle was not walking down the edges. Defendant and her companion had enough room between themselves and the outside edges that another person could walk past them closer to the edge. (T. 35) The alley was wide enough for one car to pass through, even with an oncoming car slightly pulled over, and so the alley was wide enough to have edges that would appear to allow practicable travel.

The defense contended in the trial court that it was not practicable for defendant to travel in the roadway except down the middle because of trash dumpsters and drug-abuse refuse along the edge. But the photographs marked as defense exhibits did not show any perceptible obstructions at the edge, and, particularly, did not show any obstruction that

would force a pedestrian to the middle of the street. Moreover, there was no evidence that the alley was so trash ridden that the only practical path available was down the very middle of the alley, and there was certainly no evidence that the officers were required to make such an assumption. In any event, the officers only needed reasonable suspicion or probable cause of a violation to effect the stop; they did not need a full survey of the edges of the alley to confirm a violation.

For example, even for situations in which the issue is whether there was probable cause to make a full custodial arrest, probable cause does not require absolute certainty or even a preponderance of evidence. “The Constitution does not guarantee that only the guilty will be arrested.” *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). “The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest.” *Michigan v. DeFillippo*, 443 U.S. 31, 36, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979).

Probable cause only requires a fair probability of criminal activity, not a showing by a preponderance of the evidence or beyond a reasonable doubt. *State v. George*, 45 Ohio St.3d 325, 329, 544 N.E.2d 640 (1989). “[T]he probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003) (internal quotations and citations omitted).

In short, the officers were not required to gather proof beyond a reasonable doubt

in order to effect a traffic stop based on reasonable suspicion and/or probable cause.

C.

The existence of probable cause did not depend on whether the officers issued a ticket to defendant or whether, in issuing a ticket, they cited the wrong subsection of the jaywalking ordinance. Probable cause is governed by the information known to the officers at the time of search or seizure, not by the charges brought later. *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶¶ 20-22 (“constitutionality of a prolonged traffic stop does not depend on the issuance of a citation.”). Moreover, an officer’s affirmative reliance on the wrong subsection would not invalidate a stop when another subsection did apply. *Devenpeck v. Alford* 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). An officer’s subjective reasoning need not match up with the legal reasoning that later provides the legal grounds for a court to uphold his actions. *Ohio v. Robinette*, 519 U.S. 33, 38, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996); *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978).

D.

In the appellate court, defendant relied heavily on the Code’s definition of “alley,” contending that jaywalking prohibitions have limited application in alleys so that violations can only occur if there is vehicular traffic in the alley at the time. But the definition of “alley” actually supports the State’s position that jaywalking prohibitions apply to alleys too. Columbus Code 2101.03 defines alley to mean a “street or highway intended to provide access to the rear or side of lots or buildings in the city and not intended for the purpose of through vehicular traffic, and includes any street or highway

that has been declared an 'alley' by council." This Code section plainly refers to an alley as being a "street or highway," which means that even an alley would be subject to the jaywalking prohibitions that apply without limitation to a "street or highway." An "alley" is a particular type of "street or highway" and therefore would be subject to jaywalking prohibitions, which are applicable to streets or highways without limitation. "'Street' or 'highway' means the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel." Columbus Code 2101.42.

In addition, the notion that alleys are not designed for "*through* vehicular traffic" does not mean jaywalking problems would be irrelevant or inconsequential to the "alley" setting. At a minimum, even alleys would still have vehicular traffic and therefore would still benefit from prohibitions on jaywalking, including, as here, walking in the middle of the roadway. Moreover, although alleys are not designed for "through" traffic, it is well known that the public often still uses alleys as shortcuts.

In short, nothing in the definition of "alley" makes the jaywalking prohibitions inapplicable as a matter of statutory analysis.

E.

Nor is there any support for the claim that a jaywalking violation would be dependent on proof that the offender actually or almost obstructed vehicular traffic. The jaywalking prohibition involved here does not require the presence of vehicular traffic and does not set forth any "no traffic" defense. Indeed, a jaywalker entering the street when no traffic is apparent can be quickly overtaken by vehicular traffic. Allowing

jaywalking when no traffic is seen would be shortsighted in light of the fact that vehicular activity can materialize quickly.

In addition, grafting a “no traffic” defense on this provision would violate the canon against judicial legislation. In interpreting a provision, “it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969).

F.

The creation or recognition of a “no traffic” defense would not support suppression anyway. The officers making this stop would have had no way to anticipate such a newly-invented “no traffic” defense, and their purported mistake in failing to anticipate such a newly-invented defense would be a “reasonable mistake of law” that would avoid suppression.

“[I]f an officer makes a traffic stop based on a mistake of law, the legal determination of whether probable cause or reasonable suspicion existed for the stop is judged by whether the mistake of law was an ‘objectively reasonable one.’” *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006), quoting *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005). Although other courts have held that a mistake of law cannot form the basis of a stop, *Washington*, 455 F.3d at 827, n. 1 (citing cases), there is no reason to treat mistakes of law any differently from mistakes of fact – “in mistake cases the question is simply whether the mistake, whether of law or of fact, was an objectively reasonable one.” *Smart*, 393 F.3d at 770. See, also, *State v. Garnett*, 10th

Dist. No. 09AP-1149, 2010-Ohio-5865.

Given that Columbus Code 2171.05(c) is not expressly limited to situations in which vehicular traffic is present, Officer Harmon reasonably suspected and/or had probable cause that defendant violated that prohibition. Harmon's reasonable belief that defendant violated the ordinance was sufficient for Fourth Amendment purposes. There would be no Fourth Amendment violation in that situation.

G.

Equally unavailing would be defendant's suggestion that Columbus Code 2171.05(c) would be unconstitutional in failing to have a "no traffic" defense. Traffic regulations like this are governed by the rational-basis standard, a standard easily satisfied in light of the legitimate governmental interest of providing rules of the road for pedestrians and vehicles alike, keeping roadways unobstructed from ad hoc obstructions to vehicular travel, and keeping pedestrians from being injured by traffic they might encounter on the roadway.

In any event, finding the prohibition unconstitutional at this point still would not support suppression. The good-faith exception to the federal exclusionary rule precludes suppression on the ground of an after-the-fact finding of unconstitutionality. *Illinois v. Krull*, 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); *DeFillippo*, supra.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 17<sup>th</sup> day of April, 2013, to Dennis C. Belli, Two Miranova Place, Suite 500, Columbus, Ohio 43215, counsel for defendant.

  
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STEVEN L. TAYLOR